Filed 3/13/12 Robertson v. D'Amico CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MICHAEL J. ROBERTSON, Plaintiff and Respondent, v. ANGIE L. D'AMICO, Defendant and Appellant.	A132564 (San Mateo County Super. Ct. No. 104648)

Appellant Angie L. D'Amico and respondent Michael J. Robertson are the parents of Luca Angelo Robertson D'Amico, who was born in March 2009. D'Amico challenges trial court orders adding Robertson as a surname to that of their son, and ordering Robertson to pay only 50 percent of 77 percent of child care expenses. The latter order was based on the finding that D'Amico's mother gifted to D'Amico a portion of all D'Amico's expenses, including child care. We affirm the name change order but reverse the child care expense order, concluding the trial court abused its discretion in failing to allocate actual expenses on a 50/50 basis.

I. BACKGROUND

D'Amico and Robertson were not married and never lived together. Robertson's paternity was confirmed by paternity testing. Robertson began paying D'Amico's rent at that time.

In June 2009 Robertson petitioned to establish a parental relationship, seeking to have his name added to the birth certificate; to change Luca's name to include his own surname; and for custody and visitation orders. The next month Robertson filed an order

to show cause seeking the same relief. He averred that D'Amico indicated the baby's due date was in early April and she wanted Robertson to give her some space in the weeks preceding the birth. Robertson called in early April only to learn that D'Amico had given birth a week earlier and never informed him of their son's birth.

Meanwhile, in a separate proceeding, the San Mateo County Department of Child Support Services pursued a complaint to establish parental obligations, resulting in a judgment regarding parental obligations filed January 13, 2010. Among other things, the judgment stated that the "parties shall equally share child care costs related to employment or to reasonably necessary education or training for employment skills."

Pursuant to temporary orders filed in November 2009, the trial court consolidated the child support case and Robertson's custody and visitation proceeding.

Then in January 2011, D'Amico filed a motion requesting, among other relief, an order for payment of child care expenses.

The issue of Luca's name finally proceeded to hearing in March 2011. The trial court indicated in its tentative decision that the court would add Robertson as a second surname, but allow the use of D'Amico as the last name on legal documents. D'Amico testified that the parties never married and never lived together. She stated that when she told Robertson she was pregnant, he said he did not want her to have his child. D'Amico wanted to maintain the family name, explaining she would be taking her son to school and such, and wanted them to have the same last name. She also felt it would be a burden for the child to write out a long last name. The court indicated it was standing by its tentative ruling, and gave D'Amico the choice of determining the order of the two last names.

At the evidentiary hearing on child care expenses, D'Amico produced cancelled checks written by her mother to Elva Castillo, purportedly for child care expenses, and requested that Robertson reimburse her $1,809.30. D'Amico testified that she earned about $2,000 a month, as against expenses totaling about $3,720 a month. D'Amico would give her mother her checks, and the mother in turn paid all of the bills. There was

no verbal or written agreement that D'Amico would pay her mother the difference. The court specifically found D'Amico's mother was not requiring any reimbursement.

Robertson's counsel acknowledged that there was an order directing Robertson to contribute one-half of the child care costs incurred by D'Amico to allow her to work, but argued it was clear that "in fact she's not paying these. Her mother is paying the expenses." Based on the testimony, the court determined that D'Amico's mother "is obviously helping her daughter," and that D'Amico herself was bearing 77 percent of all expenses. Therefore, it ordered Robertson to pay one-half of 77 percent of child care costs, or $1,393. The court noted that until D'Amico was paying a greater percent of her bills, "he pays 50 percent of 77."

II. DISCUSSION

A. *The Trial Court Properly Added Robertson as a Second Last Name*

D'Amico attacks the trial court order adding Robertson as Luca's second last name, arguing first that the court improperly placed the burden of proof on her to show good cause why it should not make the change. The trial court did not misallocate the burden of proof.

In his moving papers, Robertson outlined why he felt the name change was in Luca's best interest: "I feel our child has the right to have his parents on his birth certificate as well as his choice of last names. Luca has the right to any and all I have in case I was to die etc. What legal rights I[']m not sure of but believe I as well as Luca don[']t deserve to lose any."

Both parties briefed the matter for the hearing. In his brief, Robertson argued that he is the boy's father, committed to being active and involved in his son's life. Robertson added that it would be to Luca's benefit to know that both his parents' names were reflected on his birth certificate, and to have the Robertson surname added to Luca's name, observing: "He is the product of two parents and is entitled to hav[e] both of his parents recognized in the name he carries throughout the rest of his life." Further, his family was close-knit and eager to welcome Luca into their circle. In addition, adding Robertson to the child's name would also assist the public goal of sustaining Luca's

relationship with his father, a relationship which Robertson believed D'Amico was trying to hamper.[1]

Because D'Amico opposed the court's tentative ruling, he invited her to present evidence "as to why that shouldn't be." Robertson's attorney started to proceed by calling D'Amico to the stand, at which point the court interrupted: "It's your motion, but they're not agreeing to the tentative. . . . [I]f I don't hear enough evidence to change my mind, I don't need to have you bringing in a bunch of evidence as far as the Court goes." In other words, from the moving and opposing papers, the court determined that father had carried his burden, issued a tentative decision in his favor but allowed mother to bring forth additional evidence to counter that decision. There was no misallocation of the burden of proof.

On appeal, the doctrine of implied findings requires the reviewing court to infer the lower court made all factual findings necessary to support the judgment or order. This doctrine stems from three fundamental principles of appellate review: "(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

The controlling consideration in determining whether to order a change in a child's surname is the legal standard of the child's best interest. The court should consider such factors as the length of time a child has used a surname, "the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit . . . ." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 647.) Under the doctrine of implied findings, we infer that the trial court found that it was in Luca's best interest to have the Robertson surname as part of his legal name. Substantial evidence supports this implied finding. There was evidence of D'Amico's reluctance to permit Robertson to develop an

[1] In this regard, the court found D'Amico guilty of one count of contempt for her knowing, willful violation of a court visitation order.

active parental role, as evidenced by the contempt finding and other evidence, as well as Robertson's commitment to pursuing a parental relationship and his family's desire to be involved in Luca's life. The trial court fashioned an order that enabled identification of Luca with both parents and their respective families. D'Amico did not bring forth any compelling evidence to exclude the Robertson surname.

B. *The Trial Court Abused Its Discretion in Ordering Robertson to Pay 50 Percent of 77 Percent of Child Care Expenses*

1. *Legal Framework*

Family Code[2] section 4062, subdivision (a)(1) provides that the court shall order "[c]hild care costs related to employment or to reasonably necessary education or training for employment skills," as additional child support. If such expenses need to be apportioned, the code further states that expenses "shall be divided one-half to each parent, unless either parent requests a different apportionment pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate." (§ 4061, subd. (a).) The statute then sets out a complex formula for apportioning expenses other than one-half to each parent. (*Id.*, subd. (b).)

D'Amico maintains that the trial court could not modify the order that the parties share child care costs equally without a motion to modify with a current income and expense declaration and without evidence of changed circumstances, and that in any event the order amounted to an abuse of discretion.

2. *Analysis*

The court did not modify the existing order that the parties "equally share child care costs." First, we underscore that the court ruled on *D'Amico's* motion for an order for payment of child care expenses. Robertson never requested a modification of the order related to child care and hence there was no reason for him to file an income and expense declaration. The only issue was how much Robertson had to pay for his share of child care expenses. In his responsive declaration and at trial, Robertson raised a number

[2] All statutory references are to the Family Code.

of issues concerning D'Amico's veracity as to actual expenses incurred and paid, and sought confirmation that the provider was actually providing child care, number of hours and rate, and the like. The trial court concluded that D'Amico paid only 77 percent of all her expenses, including child care, and that D'Amico's mother gifted the remainder. This finding is supported by substantial evidence. Therefore, the court ordered Robertson to pay 50 percent of 77 percent of the child care expenses, until such time as D'Amico began paying more of her own expenses.

We agree with Robertson that this remedy tracks the literal language of the order that the parties equally share child care costs. For the first time in her reply brief, D'Amico accuses the trial court of failing to follow the directions of sections 4061 and 4062. The better argument is that the original child care expense order failed to track the language of section 4061, subdivision (a) by calling for sharing equally in the costs instead of requiring that the expenses be "divided one-half to each parent . . . ." This subtle difference animated Robertson's argument and the court's order. However, the only orders allowed under section 4061 are orders for dividing the expenses 50/50, or resort to a complex formula. Clearly, the court fashioning the original order intended to follow the 50/50 rule.

Prior to the evidentiary hearing, D'Amico's counsel indicated that D'Amico's mother was assisting her daughter with child care expenses. The trial court commented: "Well, since each party is required to pay half of day care, I guess it's not really an issue if her mom is paying her half. . . . I don't think that becomes an issue for the Court because he's required to pay for half of the day care regardless of the fact [that] someone else is paying the mother's half."

The court's statement is a correct statement of the law, and hence its latter order, being contrary to the law, amounted to an abuse of discretion.

III. DISPOSITION

We affirm the order adding Robertson as a surname to Luca's name, but reverse the order requiring Robertson to pay only 50 percent of 77 percent of child care expenses.

We remand for the purpose of revising the child care expense order in keeping with this decision. Parties to bear their own costs on appeal.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.*

_____
Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.